

ARBITRATION DECISION NO.:

312

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Southeastern Correctional Institution

DATE OF ARBITRATION:

December 4, 1990

DATE OF DECISION:

January 2, 1991

GRIEVANT:

James Howard

OCB GRIEVANCE NO.:

27-24-(89-11-17)-0051-01-03

ARBITRATOR:

Patricia Thomas Bittel

FOR THE UNION:

John Fisher
Sharon Van Meter Bailey

FOR THE EMPLOYER:

Joseph B. Shaver
Lou Kitchen

KEY WORDS:

Removal
Circumstantial Evidence
Personal Relationships with
Inmates
Contraband Drug Selling

ARTICLES:

Article 24-Discipline
§24.02-Progressive Discipline

FACTS:

The grievant was a Corrections Officer 2 at the Southeastern Correctional Institution. He was removed for violations of the standards of employee conduct which prohibit preferential treatment of an inmate, receiving or giving anything of value to an inmate and engaging in an unauthorized personal relationship with an inmate. The grievant allegedly provided an inmate with marijuana. The inmate was found in possession

of marijuana and was separated from the general population by being placed in the infirmary. While there, the inmate wrote the grievant a blackmail letter which, although it did not mention the sale of marijuana explicitly, did give detailed directions on how the money was to be delivered. There were no records of any bank transactions or other exchanges of money and the grievant was never found, even during a strip search, to be in possession of marijuana.

Since the blackmail letter mentioned telephone calls from the inmate to the grievant, the telephone records of the grievant were subpoenaed. It was discovered that there were five collect calls from the prison G dorm to the grievant's house. Four of these calls were person to person calls where the grievant or someone in his house must have accepted the charges.

The Ohio State Highway Patrol, in its investigation, placed a hidden microphone on an inmate who approached the grievant. The grievant declined to sell the inmate drugs; he told the inmate that he was concerned about being under suspicion.

EMPLOYER'S POSITION:

The employer argues that the State need only prove its case by clear and convincing evidence, not the criminal standard of proof beyond a reasonable doubt. The evidence strongly points towards the grievant's misconduct. It would be difficult for correctional institutions to operate if they had to prove the charges beyond a reasonable doubt. The grievant or someone in his house accepted the calls from the inmate. Although inmates may find out the home telephone numbers of guards they are not able to force individuals to accept charges at that residence. Dealing in contraband is one of the most serious offenses in a correctional setting. The inmate had no motivation to create this story and the phone calls are incontrovertible proof of the guilt of the grievant. There is just cause for the removal.

UNION'S POSITION:

The union argued that there is no evidence of wrongdoing by the grievant and the burden of just cause still rests with the State. There is no proof that the grievant received the phone calls. The State cannot prove that the grievant dealt in marijuana. Telephone calls and the word of an inmate are not conclusive. It is easy for an inmate to find the grievant's telephone number in the phone book. The inmate is framing the grievant. There were no bank records of money transactions and the grievant was even strip searched without warning and no drugs were found.

ARBITRATOR'S OPINION:

The arbitrator found that both the inmate witness and the grievant could be biased and therefore credibility is best determined from the substantive evidence. The telephone calls are strong circumstantial evidence that the inmate's story is true. This evidence was not rebutted by the grievant. There was no explanation of why these calls were accepted. Since the calls were person-to-person, someone in the grievant's house must have accepted the charges. These calls are objective proof of a series of unreported and improper contacts between the grievant and an inmate. There was just cause for dismissal.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

January 2, 1991

In the Matter of Arbitration
between

**The Ohio Department of Rehabilitation
and Correction**

and

OCSEA, Local 11, AFSCME, AFL-CIO

27-24-(89-11-17)-0051-01-03

APPEARANCES**For the Union:**

John Fisher, Staff Representative
Sharon Van Meter Bailey, Staff Representative
Floyd W. Gray, President
James Howard, Grievant

For the State:

Joseph B. Shaver, Management Advocate
Lou Kitchen, Second Chair
P. G. Bower, Warden
David J. Burrus, Labor Relations Officer
Tim Zettler, Witness

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This case was heard on December 4, 1990 at the Ohio Department of Rehabilitation and Corrections' facility in Lucasville, Ohio before the Arbitrator, Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 25.04 of the Collective Bargaining Agreement.

The parties stipulated that Grievant became employed as a Correction Officer 2 at the Southeastern Correctional Institution on September 15, 1986 and was removed from that position on November 9, 1989. His removal letter cites violation of employee conduct rules which prohibit giving preferential treatment to an inmate, offering, receiving, or giving a favor or anything of value to an inmate, dealing with an inmate without expressed authorization from the department, and engaging in unauthorized personal relationships with inmates.

The parties stipulated that Grievant's disciplinary record included one written reprimand dated September 1, 1989 for failure to follow written policies and procedures. The stipulated issue is: "Was the grievant removed from just cause, and, if not, what should the remedy be?" The grievance was fully processed, culminating in the instant arbitration proceeding. There is no issue of arbitrability in this case.

The applicable provision of the Collective Bargaining Agreement is Article 24. Section 24.01 states "Disciplinary action shall not be imposed upon an employee except for just cause. The employer has the burden of proof to establish just cause for any disciplinary action." Section 24.02 requires the employer to follow principles of progressive discipline and states that disciplinary action shall be commensurate with the offense.

EVIDENCE PRESENTED

Warden Benjamin Bower testified that marijuana was found in G Dorm of the Southeastern Correctional Institute and Inmate Zettler was identified as having sold the marijuana to other inmates. Grievant was subsequently identified as the individual bringing it into the facility, he said. Bower admitted making a statement that marijuana was found in Zettler's locker, then said it may have been found elsewhere.

He said the matter was investigated internally with both inmates and employees being questioned. In addition, the Ohio State Highway Patrol began an investigation he said. Part of the investigation process included wiring an inmate who then approached Grievant about buying some marijuana.

Bower testified the tape recording of the conversation between Grievant and the wired inmate indicated Grievant declined to make a sale and told the inmate he was concerned about being under suspicion. Bower said this exchange convinced him wrongdoing was involved and the investigation should be continued.

The Union objected to testimony of this incident, arguing no mention of it was made during the grievance procedure. The Union's objection is well-taken, and the value of the testimony about this incident is accordingly impaired.

Bower stated he first learned Grievant was dealing marijuana from the Deputy Warden. It appears other inmates found with marijuana in their possession identified Inmate Zettler as their supplier. As a result of being found to have dealt in marijuana, Zettler was placed in isolation in the infirmary to keep him away from Grievant said Bower. He stated his suspicions were confirmed when a blackmail letter from Zettler to Grievant was intercepted. Zettler ultimately received a disciplinary transfer to a maximum security facility.

Bower admitted Grievant was strip searched on one occasion with no marijuana being found, and conceded there were no records of any bank transactions or other exchanges of money attributable to dealings between Grievant and Zettler.

Labor relations Officer David Burrus testified he was the duty officer on the night Zettler's letter was intercepted. He claimed Zettler gave the letter to an Officer Morris who brought it to him unopened. Burrus said he secured it and gave it to the Warden the next day. He said the Warden opened and read the letter, which is reproduced verbatim below:

"Sue & Jim,

I am sending this final notice on the chance that you may not have received my last one.

You have until Saturday for a money order for the amount of five thousand dollars to be sent to me.

If I do not receive the money order I will forced to tell the state police what involvement the two of you had with me. Then I will give them all of the proof they need to convict the two of you -- I will inform them of the phone calls to both of your houses. (wich will show on your phone bill the phone # from my dorm.) --

I will guarantee that the police will give my people "immunity" when I have them for a state's evidence against you both. Part of wich will be some pictures that were taken of Jim on his first meeting.

-- I have copies of the receipts from money orders sent to Sue's house in the name of her 5 year old son.

--I still have the pieces of paper that Jim figured out our figures on. I also have his phone # in his own writing, and the description of his car in his own writing.

I may give them enough just to fire Jim, just to show you that I am not jokeing. And if you hurry and do what I told you I won't give them anything at all. But then again I might just say fuck you since you didn't send I to me today. But like I already said, this is your last chance. Don't take my kindness for a weakness.

The reason I am doing this is because 1). I am taking the fall for all of us. 2). There may be more charges brought against me (not that I really care I'm already doing 11-40 yrs) 3). I lost a lot of money in this whole mess 4). It took a lot of my money to get me transferred here now it is going to cost a lot to get me another good transfer. 5) They already gave me an [illegible] bit.

If you have any questions, feel free to write.

Oh by the way Jim if you don't want to send the mone you can bring (5) five (1,000) one thousand dollar bills. Those are the only 2 way I will accept the money. I am sure Jim can find a way to stop off at the infirmary before going to the dorm. (If he is still working here by then).

I hope that neither of you are stupid enough to think that I won't go through with this. Because I will.

Either bring the money Sat. or have it sent Fed. Express by Sat.

Don't fuck up.

Directions are on the next page.

Send \$5,000.00 money order by Federal Express to:
Tim Zettler, 143-570, INF

5900 BIS Road
Lancaster Ohio 43130

from
Virginia Adler
1801 Plymouth Knowl Street
Massillon Ohio 44646

Virginia Adler's signature must be on the m.o. & her name & return address on the envelope.
My name, number & lock are to be on the money order and envelope."

Two pages follow the letter, one of which contains the note "If this was not sealed, it was read" and the other containing the following note: "If you got this, call over and tell Marlowe that you got the list of stuff that I forgot in the dorm. If you are going to cooperate, tell Marlowe to tell me that you will get my stuff together. If you aren't, then tell him to tell me that you can't do it. I will then do as I said in this letter." The letter was addressed to Grievant in G Dorm.

Based upon this letter, Grievant's telephone records were subpoenaed and the telephone company was contacted for an interpretation of those records, stated Burrus. The records as explained by Burrus showed five collect calls from institution lines in G Dorm to Grievant's home during the month of July; four of these calls were person-to-person. They also showed a third party call to an individual named Billy Donnie Smith, a past inmate. In addition, the record showed inquiry had been made about both the third party call and the calls from the telephones in G Dorm.

Burrus asserted he is the training supervisor at the Southeastern Correctional Institute and claimed all officers are carefully trained that if contacted by an inmate they are to immediately report the contact to supervision. He further stated no such report was received from Grievant about the telephone calls evidenced in the records.

Inmate Zettler testified in relative detail as to how his interactions with Grievant led up to the purchase and sale of marijuana. He said Grievant first spoke of loaning money to a guard, then began talking about loaning money to a relative who intended to purchase a pound of marijuana. Then, said Zettler, the Grievant brought money into the facility and flashed it. According to Zettler, "He was the one hinting around to me about it."

He claimed the first time he purchased marijuana from Grievant he bought three ounces, then four. He said payment for the marijuana was sent to Grievant's girlfriend, Sue Brown, or to her residence. Zettler stated he sold all the marijuana received from Grievant because he did not want to worry about hiding either money or marijuana.

Zettler claimed he called Grievant's home "collect" and some of the calls were person-to-person. On one occasion Grievant's wife answered, said Zettler, but did not accept the charges. He stated when he reached Grievant, the charges were accepted. Zettler claimed he made several thousand dollars from the marijuana transactions with Grievant.

He said things began to unravel when other inmates were shaken down and identified him, Zettler, as the supplier.

Zettler identified the letter introduced by management as one of several letters he sent to Grievant. He said he wrote the letter because he had not received money from Grievant that he felt was owed.

Zettler said he felt it was safer to give the letter to an officer than to use the mails which are routinely screened. He said he told Officer Morris it was the list of property he was required to submit upon his transfer to the infirmary. His property, because of the transfer, was to be placed in another location and needed to be identified for that purpose, he explained.

At one point during his testimony, Zettler accused Grievant of offering another inmate one thousand dollars to "get rid of" him. Zettler appeared quite angry over this alleged offer.

Burrus testified on recall that there have been several removals in the history of the Department for dealing with inmates. Two removals and one resignation involved sexual conduct, he said. Another

resignation simply involved contact, stated Burrus. The case of Metzler, cited by the Union during the grievance procedure, involved an officer who contacted an ex-inmate's family two times to see if the inmate was doing all right on parole, he explained. Burrus stated this officer was suspended ten days. He said the other case cited by the Union involved an officer who was not disciplined for alleged contact because there was insufficient evidence on which to base a finding of rule violation.

President Floyd W. Gray testified he is familiar with mail room procedures, having worked there for two and a half years. He stated incoming mail is opened and searched but outgoing mail is not. He said inmates work in administrative offices and have access to the telephone numbers of officers. Inmates know the procedures to get an officer in trouble, he claimed. He said management's position at the pre-disciplinary hearing was that marijuana was found in Zettler's locker, a fact Zettler has flatly denied.

Grievant testified he did not give Zettler his telephone number and explained inmates have access to telephone books in the library. He flatly denied any dealings with Zettler and stated he did not get along with Inmate Zettler. He said Zettler was a porter and said he could not get any work from him. He claimed whenever he threatened to write Zettler up, Zettler would talk about an injury and a lawsuit against the state. He stated when he did write up Zettler, it would not go anywhere because the clerk processing the tickets was an inmate susceptible to bribes. He claimed when he threatened to put Zettler in the hole, Zettler would laugh and say he would only go to the infirmary because of his injury.

Grievant claimed he had shaken Zettler down and had others do it as well. He said another inmate told him Zettler had his telephone number and claimed he, Grievant, reported this to Management.

According to Grievant, no one in his family reported receiving calls from an inmate at the institution. Personnel from the institution do not call his home collect, said Grievant. He claimed to regularly take collect calls from a variety of sources.

ARGUMENTS OF THE DEPARTMENT

The Department asserts a distinction between administrative and criminal evidence. It argues the burden of proof is by clear and convincing evidence and maintains it is not necessary for an employer to prove its case beyond a reasonable doubt at arbitration.

In its view, Grievant was guilty of one of the most serious violations that can be committed in a correctional institution: dealing in marijuana with an inmate. It maintains Grievant profited greatly from his activities. Because it is illegal, dealing drugs with an inmate can result in injury or death when transactions go awry, contended the Department. Further, a corrections officer compromises his position and integrity when he deals with an inmate, it claims. The inmate can use the illegal activities against an officer to gain favors in return for not revealing the activity, it points out, suggesting such favors could include compromising security in the institution or simply ignoring such activities as assaulting others or engaging in sexual conduct.

In the Department's view, Grievant's phone records clearly and incontrovertibly establish four phone calls were made from G Dorm to Grievant's home phone, some of which were person-to-person. It argues Grievant's simplistic denial is unbelievable, and denies there is any evidence favoring Grievant's vindication. In its analysis, Zettler is credible because he had no motive to fabricate a story. Given the seriousness of Grievant's offense, the Department argues a just cause finding is warranted.

ARGUMENTS OF THE UNION

In the Union's view, the State removed Grievant based solely on the word of an inmate. The Department's evidence only concerned what the inmate did by telephone or letter; there is no evidence of Grievant's wrong-doing, it maintains. The record is bare of any evidence that Grievant ever possessed marijuana or gave marijuana to an inmate, asserts the Union. In its view, Zettler's statements were a set-up, prompted by promises of an institutional transfer.

The Union maintains the burden of proving just cause is on the Department. It denies the existence of concrete evidence that Grievant was dealing in marijuana, or that Grievant was the individual who received

the telephone calls from the institution. Further, it points out there is no evidence whatsoever that any money changed hands. The Union claims reinstatement with full back pay and all benefits are due the Grievant in this case.

DISCUSSION

It is clear from the record presented that marijuana was found in G Dorm and linked to Inmate Zettler. The only evidence of how the marijuana reached the inside of the prison walls is Zettler's allegation that Grievant brought it there.

Zettler has demonstrated substantial anger at Grievant for allegedly offering to pay another inmate to "get rid of him", indicating a bias against Grievant which could affect his testimony. On the other hand, Grievant is obviously interested in the outcome of the proceedings; his reputation and job are at stake. As both witnesses have evinced bias, credibility is best determined through analysis of the substantive evidence.

There was no evidence of any promise to Zettler of an institutional transfer. Hence, the Union would have the Arbitrator believe the intercepted letter was simply an attempt to frame Grievant out of spite. The credibility of the letter therefore is key to this case.

At no point in Zettler's letter is there any specific mention of dealing marijuana. Rather, the letter only references an undefined "involvement" of Zettler with Grievant and Sue Brown. Though claiming Zettler has the capability to have both Grievant and Brown convicted, at no time does it identify an offense.

There is no mention whatsoever in the letter of the sale of marijuana or illegal substances. If the purpose of the letter were simply to set Grievant up for termination, logic would require it to focus on the illicit transactions for which Grievant could be discharged, and to specifically identify Grievant's involvement.

The failure to make such allegations lends credibility to the Department's interpretation of the letter, that is, that it was a sincere blackmail attempt rather than a false trap for Grievant.

The words chosen in the letter do indeed appear to be a genuine blackmail attempt. The letter goes into detail about specific feelings of anger for "taking the fall" and losing money "in this whole mess". These emotional feelings are natural in the context of Zettler being in isolation for dealing marijuana while his supplier walked free -- the exact situation at the time the letter was written.

The letter also goes into relative detail about acceptable means of payment. The clarity of directions as to how the money was to be transferred is further evidence of Zettler's preoccupation with receiving the blackmail money. Given these facts it is my finding that the letter Zettler wrote in the infirmary is a genuine blackmail attempt. While it does not specify any particular wrongdoing by Grievant, it quite credibly establishes both an improper relationship between Grievant and Zettler as well as Zettler's frustration at "taking the fall" for it.

The letter cites certain types of evidence which were not presented at the hearing. Zettler claims in his letter to have copies of money order receipts and to have Grievant's mathematical calculations as well as some pictures. None of this evidence was presented at hearing. There is no explanation as to why the evidence was not presented. While the evidence listed by Zettler may never have existed, it may also have been excluded as evidence for some other reason. The Arbitrator simply has no way of knowing whether the evidence ever existed, and if so, what happened to it. As a result, no conclusion can be drawn from either Zettler's claim to have such evidence or from the Department's failure to produce it.

Grievant has no explanation whatsoever for his phone records. He denies ever receiving a collect call from the institution and denies such a call could have been received by anyone in his family.

The phone records themselves are records kept in the ordinary course of business and therefore are considered to be reliable evidence of fact. They incontrovertibly prove a number of collect phone calls were received at Grievant's residence directly from the institution within a short frame of time. Several of these calls were on a person-to-person basis. As the Department pointed out, it is impossible to be charged for person-to-person collect calls without consent.

There is no conceivable connection between anyone in G Dorm and the family of the Grievant. Furthermore, the fact of a specific inquiry regarding these charges further militates against the credibility of Grievant in denying that either he or his family knew of the calls. It follows that the telephone records are

strong circumstantial evidence of the truth of Zettler's testimony.

The Union's position -- that the word of an inmate should not be taken over that of an employee -- cannot be accepted in this case due to the corroborating evidence of the telephone records. The records are objective proof of a series of unreported and improper contacts between Grievant and an inmate from G dorm. The sole explanation in the record for these contacts is provided by Zettler; his explanation of the phone calls stands un rebutted.

The Arbitrator is convinced that Grievant dealt on a personal level with Zettler in breach of the institution's rules. There is no showing of inconsistent treatment; the Metzler situation is distinguished by the fact that the contact was not with an inmate inside the facility and was not drug-related. From the testimony of Zettler, the wording of Zettler's letter and the telephone records, I find that the Department has demonstrated just cause for its decision to remove Grievant from its employ.

AWARD

The grievance is denied. The termination of the Grievant in this case was in compliance with the Collective Bargaining Agreement and was for just cause.

Respectfully Submitted,

Patricia Thomas Bitte

Dated: January 2, 1991